

Soft state influence on family life – Irrelevant for the parents` fundamental rights?

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2015-01-06T16:58:18

In the field of public family law we find a number of laws that go for options not obligations, for choice not command. One example relates to the *Elterngeld*, i.e. the monthly childcare benefit that allows parents to stay at home with their newborn: The claim period of the allowance is 14 months. However, one parent's eligibility is restricted to 12 months. The period is extended to 14 months only if the second parent likewise stays at home for at least two months – the so-called partner months ([Section 4 \(3\) BEEG](#)). I am not sure if Cass Sunstein and Richard Thaler, the authors of "Nudge", would see this regulation as a nudge. They might rather call it an incentive. Either way, the partner months can be seen as a variant form of libertarian paternalism. The legislator explicitly conceived the partner months as "[an incentive for parents not to assign family work to the one and employment to the other part](#)".

From a constitutional point of view, the partner months raise the question of their compatibility with fundamental rights. They have actually been subject to several disputes before the courts. Parents claimed that the legislation is incompatible with the basic law as it puts a limit to their freedom. In German constitutional law, a violation of a constitutional liberty is determined in three steps. In a first step, we ask if there is a fundamental right whose area of protection is affected by the measure in question. At this stage, most courts agreed that the partner months fall within the scope of [Article 6 Section 1 and 2 of the basic law](#). In its classical meaning as a right of defense against intrusions by the state, Article 6 protects the citizens' freedom to independently choose how to lead their family lives.

In a second step, we ask whether the measure in question interferes with the fundamental right. This is clearly the most specific question with regard to the partner months as well as to incentives and nudges in general. However, when the courts determined whether the partner months put a limit to the parents' freedom they came to very different conclusions:

A regional [social court](#) held that the partner months interfere with fundamental rights. It stated that the freedom of making choices with regard to family life would "not be restricted only if a decision was made formally impossible or if it was prevented with (nearly) irresistible pressure". But freedom was "limited already when the state (...) links disadvantages to a certain kind of decision".

Another regional [social court](#), in contrast, did not find that the partner months encroach upon a fundamental right: "Whether one or both parents interrupt their career and chose the partner months is left to their own decision. (...) The partner months provide an offer (...) that can be accepted or refused. It does not irresistibly

urge parents to behave in a certain way, because it does not force them, neither legally nor factually, to make a certain decision.” The [Federal Social Court](#) agreed: “The partner months may have influence on how parents assume their parental responsibility.” Nevertheless, “the parents’ freedom of choice (...) is not affected in a constitutionally relevant way”. The law did not exercise “forbidden coercion” but did “merely create incentives”.

The [Federal Constitutional Court](#), too, has delivered two decisions on the partner months. But unfortunately, they do not add any flesh to the bones when it comes to the general question of the relevance of incentives and nudges under constitutional law. The Court left open whether the partner months interfere with fundamental rights and just held that the legislation was “in any case” justified.

I will come back to the question of justification later. But first, I would like to explain why, in my view, justification is actually needed: Article 6 protects a free space in which individuals are meant to make decisions as they please. Therefore, it is not sufficient if the state leaves options open for the parents. In my view, in order to determine whether what I call behavioral legislation interferes with Article 6 one has to adopt a behavioral approach that includes considerations regarding the principle of equality: If alternative ways of behavior are attached with different legal consequences, this constitutes an interference with Article 6. One might consider it crucial *to what extent* different options of behavior were differently treated. But this does not convince me when we are talking about legislation with the sole aim of changing behavior. The extent of unequal treatment can be taken account of at step three: More serious interferences require more weighty reasons for justification.

This brings me back to the question of justification, the third step. With regard to the partner months only, I could just say that I am with the [Federal Constitutional Court](#): The partner months do not violate fundamental rights because they are suitable to serve the constitutional obligation to “promote the actual implementation of equal rights for women and men”. However, I would like to draw attention to one aspect that seems important with regard to the question of the justification of incentives and nudges in general. Writing on the legitimacy of nudging, Thaler and Sunstein discuss an aspect that German constitutional lawyers would locate at step three: Namely, the aims of nudges. Thaler and Sunstein claim that the paternalistic aspect of their concept is legitimate because nudges aim at making people’s “lives longer, healthier, and better”. Nudges would influence decisions in a way „that will make choosers better off, *as judged by themselves*“.

I doubt that this approach is applicable under German constitutional law. The basic law’s concept of constitutional liberties is difficult to reconcile with an idea of citizens who need to be told by the state what is better for them. Also, I do not see how the legislator can even *know* what the individuals’ interests are. He can rather know – or better: democratically determine – what the *public* interest is. Accordingly, the Federal Constitutional Court held that the partner months were justified, because they were suitable to break down traditional role assignments with their discriminating effects in the labor market. It rightly did not base its argument on the idea that the partner months would serve the parents’ individual interest in having equal – or better – partnerships. In other words: Insofar as nudges and incentives

affect fundamental rights, the government has to invoke public interests and cannot justify its measures on grounds of the assumed interests of the addressees.

